No. 78-639

In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 367, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

JOHN S. IRVING
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

COLLIS SUZANNE STOCKING
Attorney
National Labor Relations Board
Washington, D.C. 20570

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OPINIONS BELOW

The court of appeals enforced the Board's order without opinion (Pet. App. 1a-2a). The decision and order of the National Labor Relations Board (Pet. App. 5a-62a) is reported at 230 N.L.R.B. 86.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1978. Petitioner's timely petition for rehearing was denied on July 18, 1978 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on October 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board is empowered to interpret the terms of a collective bargaining agreement for the purpose of devising an appropriate remedy for an unfair labor practice.

2. Whether, on the facts of this case, the Board properly determined the priority referral status to be accorded 11 named complainants and properly concluded that the status of 26 other complainants should be determined in subsequent compliance proceedings.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 63a-64a.

STATEMENT

1. Petitioner ("the Union"), pursuant to its collective agreement with electrical contractors in the Pennsylvania—New Jersey—Delaware area, maintains a hiring hall which serves as the exclusive referral source of electricians to the covered employers. The agreement provides a system of priority referral, which divides applicants into four groups with each applicant being assigned by the Union to the highest group for which he qualifies.[1] (Pet. App. 10a-11a.) The agreement mandates the Union to administer periodically a journeyman's examination which is a prerequisite to placement in referral groups I and II (Pet. App. 16a).

[1]The four referral groups are (Pet. App. 11a-12a):

GROUP I—All Applicants for employment who have four or more years' experience in the trade, are residents of the geographical area constituting the normal construction labor market, have passed a Journeyman's examination given by Local No. 367, I.B.E.W. * * * and who have been employed for a period of at least one year in the last four years under a collective bargaining agreement between the parties of this Agreement.

GROUP II—All applicants * * * who have four or more years' experience in the trade and who have passed a Journeyman's examination given by a duly constituted Local Union of the I.B.E.W. * * *

GROUP III—All applicants * * * who have two (2) or more years' experience in the trade, are residents of the * * * area * * * and who have been employed for at least six (6) months in the last three (3) years in the trade under a collective bargaining agreement between the parties to this Agreement.

GROUP IV—All applicants * * * who have worked at the trade for more than one (1) year.

In June 1975, the Union administered the journeyman's examination to its members, regardless of their work experience. All 103 members who took the test passed. Consequently, 87 of the members were moved from Group III to Group II and 16 moved from Group II to Group I (Pet. App. 19a, 21a-22a). None of the 37 non-Union applicants seeking work through the hiring hall during the relevant period was allowed to take the examination and, as a consequence, none was reclassified into a higher priority referral group (Pet. App. 18a-19a).

George Wilson, a past member and former business agent of the Union, had 20 years' experience as an electrician and had passed the journeyman examination given by the Union in 1949 (Pet. App. 26a-27a). In September 1975, Wilson registered for employment at the hiring hall and was classified in referral Group II (Pet. App. 27a). Later in the month, Wilson, who was on bad terms with the incumbent Union officers, had a heated dispute with Union Business Manager Cuvo over job referrals which resulted in the police being called to eject Wilson from the hall (Pet. App. 28a-29a). Shortly thereafter, Cuvo unilaterally changed Wilson's priority

referral status from Group II to NONE, ostensibly because Wilson's experience was too remote in time to qualify for any priority status (Pet. App. 29a-30a). The next day, when Wilson attempted to register, he was informed that he was barred from the premises and that trespassing charges would be instituted if he persisted in trying to enter (Pet. App. 32a-33a).

2. The Board, adopting (except in one respect) the decision of the Administrative Law Judge,[2] found that the Union violated Section 8(b)(2) and (1)(A) of the Act, 29 U.S.C. 158(b)(2) and (1)(A), by denying the 37 non-Union applicants the right to take the journeyman's examination because they were not members of the Union (Pet. App. 57a n.1, 36a).[2] The Board further found that, of the 11 non-Union applicants who testified at the hearing as to their qualifications, 10 were otherwise qualified for Group I status and one was qualified for Group II status (Pet. App. 37a-38a).[3]

The Board found an additional violation of the Act in the Union's actions in ejecting and barring Wilson from the hiring hall and in removing him from Group II

[2]The Law Judge concluded that, since no evidence was adduced at the hearing as to the eligibility under the collective agreement to take the journeyman examination of 26 of the nonmembers, the complaint should be dismissed as to them (Pet. App. 37a). The Board reversed the Law Judge on this point. It concluded (Pet. App. 57a n.1): "[T]he violation having been found, the extent of any consequent loss by nonmembers in addition to those specifically found to have suffered as a result is a question for the compliance stage of this proceeding."

[3]The Law Judge rejected petitioner's contention that the contract required four years' experience as an inside wireman. The Law Judge stated (Pet. App. 16a-17a):

> The contract * * * does not define what the phrase "experience at the trade" encompasses and it is reasonable to assume that it generally includes the full gamut of electrical skills in the trade and not, as the [Union] suggests * * *, only inside journeyman wireman's experience.

classification and placing him in a "none" classification, so as to render him ineligible for referral. The Board found that the Union's actions were motivated by hostility to Wilson based on his opposition to the Union's incumbent officers, rather than dictated by legitimate considerations as the Union contended[4] (Pet. App. 44a-45a).

In finding that the Union violated the Act, the Board rejected its contention that the complainants should have appealed to the contractually established Appeals Committee[5] and that the Board should have deferred to that body. The Law Judge stated (Pet. App. 40a; footnote omitted):

> I do not believe that it would serve the purposes of the Act to deny the complainants access to the Board to vindicate their statutory rights simply because they

[4]The Union contended that Wilson's reclassification was properly based on the remoteness of his experience and the time when he took the journeyman's examination (Pet. App. 43a). In rejecting this assertion, the Law Judge pointed out that nothing in the collective agreement restricted qualifying experience to that gained in recent years and that where there were restrictions for particular groups the agreement had stated them explicitly (Pet. App. 43a n.42). The Law Judge further noted that the contract expressly approved experience rating tests given prior to 1959. Finally, the Law Judge noted that the restriction applied to Wilson had been unilaterally adopted by business manager Cuvo and had never been applied before (Pet. App. 43a). Concerning the Union's reliance on the approval of Cuvo's interpretation by the contractually established Labor-Management Committee, the Law Judge pointed out that Cuvo secured the Committee's acquiescence only after he had disqualified Wilson (Pet. App. 43a).

[5]The contract establishes an Appeals Committee, composed of a union representative, an employer representative and a public member selected by the other two, with authority to consider and make a final decision on applicants' complaints arising out of the operation of the referral system (Pet. App. 12a-13a). None of the complainants filed a grievance with the Appeals Committee (Pet. App. 39a).

failed to submit their grievances to the Appeals Committee. Not only is the [Union's] Business Manager Cuvo, who is inextricably involved in the unfair labor practices alleged herein, a member of this Committee, but the employer-member, though not charged as a party respondent, is potentially responsible for the discriminatory administration of the hiring hall which it has agreed with the [Union] to establish as the exclusive source for recruiting electricians. In these circumstances, whether or not the employer-member of the Committee is unalterably disposed to support the [Union's] position, I find that a possible conflict of interest exists vis-a-vis the complainants. This appears to me to make the Appeals Committee an inappropriate forum for the impartial resolution of the complainants' grievances against the [Union] regarding the discriminatory treatment they allegedly received from the [Union's] operation of the hiring hall.

The Board ordered the Union, *inter alia*, to place the 11 individuals who were found to have been unlawfully denied Group I or II status in the appropriate referral groups, to place in the appropriate referral group any other nonmember registrant who was unlawfully denied the opportunity to take the June 7, 1975 examination without regard to the examination requirement, and to restore Wilson to Group II referral status (Pet. App. 51a). The order further requires the Union to make whole each of the above individuals for any loss of earnings he may have suffered by reason of the Union's unfair labor practices (*ibid.*).

3. The court of appeals enforced the Board's order without opinion (Pet. App. 1a-2a).

ARGUMENT

Petitioner does not contest the Board's findings that it engaged in conduct prohibited by the Act when it denied non-members the right to take the journeyman's examination and changed Wilson's referral priority status. Rather, petitioner contends that the Board should have deferred to the contractual appeals committee instead of exercising jurisdiction, since its remedial order required an interpretation of the collective agreement (Pet. 10-12). The other claim is that the Board's order should not have applied to 26 employees who did not testify at the hearing (Pet. 12-13). These contentions are without merit and, in any event, present no question warranting review by this Court.

1. In *NLRB* v. *Strong*, 393 U.S. 357, 360-361 (1969), this Court held that:

> [T]he business of the Board, among other things, is to adjudicate and remedy unfair labor practices. Its authority to do so is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *." §10(a), 61 Stat. 146, 29 U.S.C. §160(a). Hence, it has been made clear that in some circumstances the authority of the Board and the law of the contract are overlapping, concurrent regimes, neither preempting the other. Arbitrators and courts are still the principal sources of contract interpretation, but the Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts. *Smith* v. *Evening News Assn.*, 371 U.S. 195, 197-198 (1962). It may also, if necessary to adjudicate an unfair labor practice, interpret and give effect to

> the terms of a collective bargaining contract. *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421 (1967). [Citations and footnote omitted.]

There the court of appeals affirmed the Board's unfair labor practice findings, but refused to enforce its order that the company pay certain fringe benefits provided for in the collective agreement, finding that such an order was "beyond the power of the Board," 386 F. 2d 929 (9th Cir. 1967). In reversing, this Court stated that "an effective remedy for [unfair labor practices] is [the Board's] proper business [and] [t]o this extent the collective contract is the Board's affair * * *." 393 U.S. at 361.

In the instant case, the Board interpreted the collective agreement only insofar as it was necessary to provide an effective remedy for the discriminatees. *Strong* plainly recognizes the Board's authority to do so. Accordingly, insofar as petitioner challenges the Board's interpretation of the contract, the only issue actually presented is whether the Board erred in interpreting the phrase "experience in the trade" to cover "the full gamut of electrical skills in the trade" (*supra*, note 3), rather than limiting it to inside wireman's work. That question, which involves only the facts of this particular case, is not appropriate for review here.[6] *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

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[6]Contrary to petitioner (Pet. 6), the record does not establish that "the phrase 'experience at the trade' means experience as an "inside wireman." Petitioner argued to the Board that "inside," "outside," and "residential" wireman jobs are considered separate crafts. Petitioner relies on certain of its forms as making such distinction (A. 711A, A.714), but ignores others which do not refer to "wiremen" but, instead, indicate that "electrician," "lineman," "cable splicer" and "apprentice" are the distinct "trade" categories relevant to hiring hall referral and ask the applicant to specify his "Number of years experience in electrical trade" (A. 273, 387, 716). Moreover, the record supports the Board's conclusion that both the terms "the trade" and "wireman" are customarily understood as being more comprehensive than the Union contends. For example, there is testimony indicating that the terms "inside wireman" and "journeyman electrician" are commonly used interchangeably (A. 91), that "house wiring" is "wireman work" (A. 130), that certain electrical "maintenance" work is "journeyman wireman" work (A. 156), and that "residential" work is encompassed within "the trade" (A. 172).

"A." references are to the appendix to the parties' briefs in the court of appeals.

2. Petitioner contends (Pet. 12-13) that the Board has "impose[d] a finding of unfair labor practices and a remedy favoring persons for whom no evidence was taken," complaining that the "General Counsel produced no evidence that the 26 'other' persons were or could have qualified for work referral based on admittedly legitimate residence, experience or other factors."[7] This description mischaracterizes what the Board did here. The unfair labor practice which petitioner was found to have committed was discriminatorily denying nonmembers the right to take the qualifying test. The record evidence establishes that violation as to the 26 complainants who did not testify, no less than as to the 11 who did. The record also establishes that residence, experience and other factors were not prerequisites for the right to take the test. All members were offered the opportunity to take the test irrespective of such factors and all nonmembers were denied that opportunity.

Residence and experience are pertinent to proper classification in the priority referral system. However, the Board's order does not direct that the 26 complainants be

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[7]In the "Question Presented" (Pet. 3), petitioner urges that the Board's remedy should have been limited to ordering the Union to allow the nonmembers to take the qualifying test. Petitioner does not support this assertion in the "Reasons for Granting the Writ," nor does it quarrel with the Board's finding that the simplicity of the test was such that, on this record, it was clear that all who took it would pass (Pet. App. 21a-22a, 38a). In any event, the assertion raises only an evidentiary issue as to whether the latter finding is supported by the record.

placed in any particular referral group. It merely requires that these 26 individuals be placed in "appropriate" groups (Pet. App. 58a); none of them need be reclassified without offering the same sort of proof of adequate experience as the Union actually required of the 103 members it reclassified pursuant to the June 7 examination. In any subsequent backpay proceeding, the Union will have the opportunity to show that any particular claimant would not have been referred out of the hall even if the examination and subsequent reclassification procedure had been carried out legally.[8] See *NLRB* v. *International Longshoremen's and Warehousemmen's Union, Local 13*, 549 F. 2d 1346, 1355 (9th Cir.), cert. denied, 434 U.S. 922 (1977).

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[8]After a Board order has been entered, the Board's regional office administratively determines such compliance issues as reclassification and backpay. Where the respondent does not voluntarily accept the regional office's determination, the Board invokes administrative procedures which culminate in a decision by an Administrative Law Judge, which is reviewed by the Board. See Board's Rules and Regulations, 29 C.F.R. 102.52-102.59; Board's Statements of Procedures, 29 C.F.R. 101.16. Similarly, Board orders arising from compliance proceedings must be enforced by an appropriate federal court under Section 10(e) of the Act, 29 U.S.C. 160(e). See, generally, *NLRB* v. *Local 138, International Union of Operating Engineers*, 380 F. 2d 244, 245-246 (2d Cir. 1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN S. IRVING
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

COLLIS SUZANNE STOCKING
Attorney
National Labor Relations Board

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